

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TWO MEN AND A
TRUCK/INTERNATIONAL, INC.,

Plaintiff,

v.

T&S TRANSPORTATION, INC., et al.,

Defendants.

CASE NO. C12-371RAJ

ORDER

I. INTRODUCTION

This matter comes before the court on Plaintiff's motion to hold Defendants in contempt of the September 13, 2012 consent judgment that resolved this action. No one has requested oral argument or an evidentiary hearing. For the reasons stated below, the court DENIES the motion. Dkt. # 41.

II. BACKGROUND

Plaintiff uses its "Two Men and a Truck" service mark in connection with its nationwide network of local moving franchises. Defendants, Ray Tanner and the company he owns and operates, used various permutations of the "Two Men and a Truck" phrase in promoting moving services in and around Everett, Washington. Plaintiff sued Defendants in March 2012 for trademark infringement and related violations of the law.

1 The parties resolved their disputes in a consent judgment that the court entered in
2 September 2012. Dkt. # 38. The critical clause of that judgment, which includes a
3 permanent injunction, is as follows:

4 Defendants . . . are hereby **PERMANENTLY ENJOINED AND**
5 **RESTRAINED** from using the phrase or mark “Two Men and a Truck” or
6 any colorable imitation thereof including without limitation “Two Men & a
7 Truck”, “2 Men and a Truck” and “2 Men & a Truck”, whether alone or in
8 combination with other terms such as “Special”, in any manner whatsoever
including, without limitation, print and internet advertising
Defendants shall transition to use of the phrase “A Truck and Two Movers”
by no later than September 20, 2012.

9 Sept. 13, 2012 Consent Judgment, Dkt. # 38 (emphasis and punctuation except ellipses in
10 original). Plaintiff drafted the consent judgment with the assistance of counsel.
11 Defendants, who had no counsel in this litigation, approved the judgment without
12 modification. There is no indication that Defendants had the assistance of counsel.

13 Plaintiff contends that Defendants have violated and continued to violate the
14 consent judgment. In September 2013, Plaintiff entered the phrase “two men and a truck
15 seattle” into the Google search engine, which returned (among other things) a paid
16 advertisement with the hyperlinked headline “Two Men & A Moving Truck” that linked
17 to Defendants’ website. The same search also returned two unpaid links with hyperlink
18 headlines beginning with “T&S – Two Men and a Van 79.95 Special” that also linked to
19 Defendants’ website. Plaintiff’s search for “two men and a truck everett” returned
20 (among other things) a paid advertisement with the hyperlinked headline “Two Men & A
21 Moving Truck – Special \$79.95 PH with Free Boxes” that also linked to Defendants’
22 website. When Plaintiff used Google to search for the phrase “a truck and two movers”
23 on Defendants’ website, it found no matching results. Instead, the results included
24 numerous iterations of the phrase “Two Movers and a Truck.”

25 Based on this evidence, Plaintiff moved for an order holding Defendants in
26 contempt, requiring them to pay a \$500 fine for each additional day of noncompliance

1 with the consent judgment, requiring them to cease using the phrase “Two Men &
2 Moving Truck” and to use ““A Truck and Two Movers’ to the exclusion of any other
3 phrase as a mark in connection with Defendants’ moving services business.”

4 III. ANALYSIS

5 A party requesting that a court hold another party in contempt must prove by clear
6 and convincing evidence that the alleged contemnor violated a specific order of the court.
7 *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir. 1999). If the party
8 succeeds, the burden shifts to the alleged contemnor to demonstrate that it substantially
9 complied with the order, or complied with a good faith and reasonable interpretation of
10 the order, or was unable to comply with the order. *Id.*; *Go-Video, Inc. v. Motion Picture*
11 *Ass’n of Am. (In re Dual-Deck Video Cassette Recorder Antitrust Litig.)*, 10 F.3d 693,
12 695 (9th Cir. 1993).

13 Plaintiff’s prospects for success hinge on showing by clear and convincing
14 evidence that Defendants violated the consent judgment. *See Wolfard Glassblowing Co.*
15 *v. Vanbragt*, 118 F.3d 1320, 1322 (9th Cir. 1997). Consent judgments are hybrid rulings
16 with “attributes of both contracts and judicial decrees.” *United States v. ITT Cont’l*
17 *Baking Co.*, 420 U.S. 223, 236 n.10 (1975). They are the product of negotiation between
18 the parties, and in that regard resemble contracts. *Id.* at 237 (“[S]ince consent decrees
19 and orders have many of the attributes of ordinary contracts, they should be construed
20 basically as contracts . . .”). The court must interpret a consent judgment “as it is
21 written, not as it might have been written had the plaintiff established his factual claims
22 and legal theories in litigation.” *United States v. Armour & Co.*, 402 U.S. 673, 682
23 (1971); *see also Gates v. Shinn*, 98 F.3d 463, 468 (9th Cir. 1996) (“Courts must find the
24 meaning of a consent decree within its four corners, and not by reference to the court’s
25 purpose or the purpose of the party seeking to hold the other in contempt . . .”) (internal
26 quotation omitted).

1 Plaintiff contends that the consent decree prohibits Defendants' use of the phrases
2 "Two Men and a Van," "Two Men and a Moving Truck," and "Two Movers and a
3 Truck" because they are "colorable imitations" of the phrase "Two Men and a Truck."
4 That argument is plausible. Certainly some people would find those phrases to be
5 "colorable imitations" of the phrase in question. But some people might find the phrase
6 "colorable imitation" to be vague. Indeed, a person might well conclude that the phrase
7 "A Truck and Two Movers," the very phrase that Plaintiff insists Defendants must use, to
8 be a "colorable imitation" of "Two Men and a Truck." The phrase "colorable imitation"
9 has a specific meaning in trademark law, *Wolfard Glassblowing*, 118 F.3d at 1322, but
10 Plaintiff entered the consent decree with unrepresented Defendants who would have no
11 reason to know the legal meaning of the phrase.

12 The consent judgment's only examples of "colorable imitations" of the phrase
13 "Two Men and a Truck" are "Two Men & a Truck," "2 Men and a Truck," and "2 Men &
14 a Truck." The consent judgment listed these examples "without limitation," but a
15 reasonable person could conclude based on those examples that a "colorable imitation" of
16 "Two Men and a Truck" required the use of words and symbols that amounted to that
17 very phrase. Thus, a reasonable person could conclude that, for example, "Two Movers
18 and a Truck" is not a "colorable imitation" of "Two Men and a Truck." Reasonable
19 people might disagree, of course. But where there is a reasonable interpretation of the
20 consent judgment under which Defendants did not violate it, Plaintiff has not met its
21 burden to show contempt by clear and convincing evidence. *See Gates*, 98 F.3d at 471
22 (listing numerous possible meanings for "appropriate" care in consent decree), at 472
23 (finding decree "insufficiently specific to uphold the district court's contempt order").

24 The other alleged violation of the consent decree is Defendants' alleged failure to
25 "transition to use of the phrase 'A Truck and Two Movers.'" Plaintiff ignores evidence
26 that Defendants provided demonstrating that they made changes with Google's

1 advertising service on September 20, 2012 to change hyperlinked ad headlines from
2 “Two Men & a Truck” to “Two Movers & Truck.” Def.’s Opp’n (Dkt. # 43), Ex. B.¹
3 Plaintiff’s evidence merely shows that a search of Defendants’ website itself revealed no
4 instances of the phrase “A Truck and Two Movers.” That is not dispositive, because the
5 consent judgment does not require Defendants to use the phrase on their website. The
6 requirement that Defendants use the phrase “A Truck and Two Movers” *exclusively* (on
7 their website or elsewhere) appears nowhere in the consent judgment. It merely requires
8 “transition to the use of [that] phrase” by September 20, 2012. The evidence shows that
9 Defendants did transition to the use of that phrase, and there is no clear and convincing
10 evidence that they have ceased doing so. That they apparently have not used that phrase
11 exclusively is no violation of the consent decree. Indeed, if the consent decree mandated
12 the exclusive use of the phrase “A Truck and Two Movers,” its prohibition on the use of
13 “colorable imitations” of “Two Men and a Truck” would be superfluous.

14 Plaintiff drafted a consent judgment that is simply inadequate to squarely
15 proscribe Defendants’ conduct. If Plaintiff wished to prohibit the use of the phrase “Two
16 Movers and a Truck” or “Two Men and a Moving Van,” or to require the exclusive use of
17 the phrase “A Truck and Two Movers,” then it should have drafted the consent judgment
18 more precisely. As matters stand, the court cannot hold Defendants in contempt. *See*
19 *Gates*, 98 F.3d at 468 (“If an injunction does not clearly describe prohibited or required
20 conduct, it is not enforceable by contempt.”).

21 In reaching this conclusion, the court emphasizes to Defendants that the court
22 suggests no opinion on whether Defendants’ conduct is lawful. Defendants remain

23 ¹ Mr. Tanner’s company, T&S Transportation and Installation, Inc., is not represented by
24 counsel, and therefore cannot appear in federal court. *See* Local Rules W.D. Wash. LCR
25 83.2(b)(3); *Rowland v. Cal. Men’s Colony*, 506 U.S. 194, 201-02 (1993) (“It has been the law for
26 the better part of two centuries . . . that a corporation may appear in the federal courts only
27 through licensed counsel.”). Mr. Tanner submitted identical oppositions to Plaintiff’s motion
28 both on his own behalf and on behalf of his corporation. The latter submission violates court
rules, but the violation is immaterial. There is no material difference between Mr. Tanner’s
conduct and the conduct of his corporation for purposes of the motion before the court.

1 subject to consequences if they are infringing Plaintiff's trademarks or otherwise
2 violating the law. The only question before the court is whether Defendants' conduct
3 plainly violates the consent judgment. The court holds that it does not.

4 **IV. CONCLUSION**

5 For the reasons stated above, the court DENIES Plaintiff's motion to hold
6 Defendants in contempt. Dkt. # 41.

7 DATED this 13th day of January, 2014.

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10 The Honorable Richard A. Jones
11 United States District Court Judge
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